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INFOVALLEY LIFE SCIENCES SDN BHD v. SRIMELAN SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[COMPANIES WINDING-UP NO: 28NCC-703-09-2014]
B 25 FEBRUARY 2015

COMPANY LAW: *Winding up – Stay of proceedings – Application for – Respondent lodged police report against petitioner for using false affidavit in petition – Whether hearing of petition stayed until completion of police* C *investigation – Whether respondent allowed to oppose petition without filing affidavit – Whether finality of judgment obtained against respondent affected by police report – Whether petitioner a legal entity separate from its directors and shareholders – Whether prosecution pursuant to police report could only be commenced against petitioner's deponent – Whether respondent could rely on* D *police report without filing any affidavit to oppose petition – Whether respondent able to pay its debts – Whether commercially insolvent – Companies Act 1965, ss. 218(1), (2) & 221(1) – Companies (Winding-up) Rules 1972, rr. 5, 7(2) & 30(1)*

COMPANY LAW: *Winding up – Inability to pay debts – Stay of proceedings – Application for – Respondent lodged police report against petitioner for using false* E *affidavit in petition – Whether hearing of petition stayed until completion of police investigation – Whether police report affected winding up proceedings – Whether respondent able to settle debts due and payable to petitioner – Rebuttable presumption of respondent's insolvency – Whether respondent had legal burden to rebut presumption on balance of probabilities – Whether respondent commercially* F *insolvent – Whether respondent wound up – Companies Act 1965, ss. 218(1), (2) & 221(1) – Companies (Winding-up) Rules 1972, rr. 5, 7(2) & 30(1)*

WORDS & PHRASES: *'shall' – Companies (Winding-up) Rules 1972, r. 7(2) – Application for stay – Whether respondent filed summons in chambers – Whether oral application fulfilled mandatory requirement under r. 7(2)*

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WORDS & PHRASES: *'shall' – Companies (Winding-up) Rules 1972, r. 30(1) – Filing of affidavit – Whether respondent required to file affidavit to oppose winding up petition at least seven days before hearing of petition – Whether respondent's application to stay proceedings allowed – Whether respondent could oppose petition – Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping*

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The petitioner filed a suit against the respondent in the High Court ('petitioner's suit') and judgment was given in favour of the petitioner where the respondent was ordered, *inter alia*, to pay RM15,039,459 to the petitioner. The respondent did not file an appeal against the judgment of the High Court. Due to its failure to settle the judgment debt, a statutory I notice under s. 218(2)(a) of the Companies Act 1965 ('CA') was served on

the respondent. Despite the issuance of the statutory notice, the respondent failed to settle the judgment sum. As a result, the petitioner filed a petition to wind up the respondent ('this petition'). On 24 November 2014, the petition was heard for the first time and the respondent was not represented either by learned counsel or by an authorised representative. The respondent also did not file any affidavit to oppose this petition as required by r. 30(1) of the Companies (Winding-up) Rules 1972 ('CWUR'). As a result, the petition was allowed and the respondent was ordered to be wound up ('the first winding up order'). One and a half hours later, the respondent's authorised representative came to court and submitted, *inter alia*, that he did not know about the first winding up order and apologised for the delay in attending court on that day. The first winding up order was set aside since the order was not perfected and the court was not *functus officio*. The respondent's application to adjourn the hearing of this petition was allowed only up to the next hearing date *ie*, 17 December 2014 ('the second hearing'). During the second hearing, the respondent still did not file any affidavit to oppose this petition and the court was informed that the respondent had lodged a police report against the petitioner for using a false affidavit in the petitioner's suit which constituted an offence under s. 193 of the Penal Code. As such, the respondent's representative applied for a stay of the hearing of this petition until completion of the police investigation into the respondent's police report. The issues that arose for consideration, *inter alia*, were (i) whether the court should stay the hearing of this petition until completion of the police investigation into the respondent's police report; and (ii) whether the respondent could oppose this petition without filing any affidavit.

Held (dismissing respondent's application and allowing petitioner's petition to wind up respondent):

(1) Section 221(1) of the CA confers power on the winding up court to adjourn a winding up petition conditionally or unconditionally. The hearing of a winding up petition should not be stayed or adjourned. Instead, it should be heard expeditiously under the CWUR. On this ground alone, the stay application should be dismissed (*Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals*; refd). (para 12)

(2) The respondent did not appeal to the Court of Appeal against the judgment. Based on the cause of action estoppel doctrine as well as the issue estoppel doctrine (both these doctrines form the *res judicata* concept), the judgment was final as against both the petitioner and respondent. The finality and binding effect of the judgment on the petitioner and respondent was not affected in any manner by the respondent's police report (*Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd*; refd). (paras 13 & 14)

(3) Even if the respondent filed a fresh action to set aside the judgment, such a suit could not set aside the judgment without proof beyond all reasonable doubt that the petitioner obtained the judgment by fraud within the meaning of s. 44 of the Evidence Act 1950. On the facts, the respondent did not even file a fresh suit to set aside the judgment. Further, the validity of the judgment was fortified by s. 114(e) of the Evidence Act 1950. (para 15)

(4) Any prosecution for giving false evidence under s. 193 of the Penal Code is generally tried in the Sessions Court according to s. 63 of the Subordinate Courts Act 1948. The issues, factual and legal, which concerned a prosecution under s. 193, were different from the questions which arose in the petitioner's suit. The purpose and effect of a police investigation and prosecution were different from the consequences of a civil judgment. (para 15)

(5) The petitioner's affidavit could only be affirmed in the petitioner's suit by an individual person on behalf of the petitioner. Any prosecution pursuant to the respondent's police report could only be commenced against the petitioner's deponent. Under s. 16(5) of the CA, the petitioner was a legal entity which was separate from its directors, shareholders, employees and agents. As such, the prosecution did not affect the petitioner in any adverse manner. Further, the police investigation into the respondent's police report and any possible prosecution of the petitioner's deponent did not directly involve the petitioner and this petition. (para 16)

(6) The stay application did not fall under r. 5(1)(a) to (g) of the CWUR. However, it fell within r. 5(2) and may be heard in chambers of the winding up court. Rule 7(2) is a mandatory provision due to the imperative term "shall". As such, the respondent had to file a summons in chambers to apply for a stay of this petition pending completion of the police investigation into the respondent's police report. An oral stay application made by the respondent's authorised representative did not fulfill the mandatory rule under r. 7(2). (para 17)

(7) Rule 30(1) of the CWUR employs the word "shall" and requires the respondent to file in the winding up court and serve on the petitioner an affidavit to oppose this petition at least seven days before the hearing of this petition. Although the court adjourned the first hearing, the respondent did not file any affidavit to oppose this petition. The respondent was also informed that there would be no further postponement of this petition at the second hearing. If the respondent's police report was considered in deciding this petition, it

would be as if the respondent was allowed to circumvent the mandatory requirement of r. 30(1). Further, the respondent's police report was not exhibited in any affidavit which complied with r. 30(1). As such, the respondent could not oppose the petition by relying on the police report without filing any affidavit as required under r. 30(1) (*Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping*; refd). (paras 19 & 22)

(8) The petitioner had served the statutory notice on the respondent and upon the respondent's failure to pay the judgment sum within 21 days from the date of service of the statutory notice, the petitioner may rely on a rebuttable presumption of the respondent's insolvency under s. 218(2)(a) of the CA. The commercial solvency or cash flow solvency test is used to decide whether the respondent company was able to pay its debts under s. 218(1)(e) of the CA. The respondent's police report could not show the respondent's commercial solvency or cash flow solvency so as to resist this petition. The respondent was commercially insolvent and did not satisfy the cash flow solvency test since (i) the judgment sum of RM15,039.459 was huge; and (ii) this petition had exhibited a copy of the respondent's company search from the records of the Companies Commission of Malaysia. The respondent also failed to adduce any affidavit to rebut the presumption of insolvency under s. 218(2)(a). (paras 23, 24 & 26)

(9) Upon the respondent's failure to settle the judgment sum on 27 August 2014, *ie*, after the lapse of 21 days period, a rebuttable presumption of the respondent's insolvency arose under s. 218(2)(a) of the CA whereby the respondent had the legal burden to rebut such a presumption on a balance of probabilities. On the facts, the respondent did not discharge its legal burden to rebut the insolvency presumption because the respondent did not file any affidavit in this petition. (paras 27 & 28)

(10) This petition was allowed and the respondent was wound up. Further, the official receiver as the respondent's liquidator shall follow up and fully assist in the police investigation in respect of the respondent's police report and any prosecution which may be commenced by the Public Prosecutor pursuant to the respondent's police report. (paras 29 & 30)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(refd)***

Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775 CA ***(refd)***

A *Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping [2011] 1 LNS 1952 CA* ***(refd)***
KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases [2014] 1 LNS 427 HC ***(refd)***
Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 CA ***(refd)***
Ling Nam Rubber Works v. Leong Bee & Company (No 2) [1968] 1 LNS 73 HC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other
B *Appeals [2001] 3 CLJ 248 CA* ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
PP v. Yap Min Woie [1995] 4 CLJ 692 FC ***(refd)***
Re Jagvinder Singh Maghar Singh; Ex p Mohd Radzi Ismail & Ors [2014] 1 LNS 858 HC ***(refd)***
C *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd [1984] 1 LNS 6 FC* ***(refd)***
Sri Hartamas DVPT Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Legislation referred to:
D Companies Act 1965, ss. 16(5), 218(1)(e), 218(2)(a), 221(1)
Companies (Winding-up) Rules 1972, rr. 5(1)(a), (b), (c), (d), (e), (f), (g), (2), 7(2), 30(1)
Evidence Act 1950, ss. 44, 114(e)
Federal Constitution, arts. 5(1), 8(1)
Juvenile Courts Act 1947, ss. 12(1), 28
E Penal Code, s. 193
Subordinate Courts Act 1948, s. 63

For the petitioner - Yarp Khai Pin; M/s Arianti Dipendra Jeremiah
For the respondent - In person

F *Reported by Kumitha Abd Majid*

JUDGMENT

Wong Kian Kheong JC:

G **Introduction**

[1] This case discusses an interesting question of whether a company may stay and oppose a winding up petition filed by the company's judgment creditor on the ground that the company has lodged a police report alleging the commission of an offence committed by the judgment creditor against
H the company.

Facts

[2] The petitioner company (Petitioner) has filed a civil suit against the respondent company (respondent) in Kuala Lumpur High Court Civil Suit
I No. 22NCC-992-06-2012 (Petitioner's Suit). The respondent has filed a counterclaim against the petitioner in the petitioner's suit (respondent's counterclaim).

[3] After a trial of the petitioner's suit and respondent's counterclaim, on 3 July 2014 Mary Lim Thiam Suan J decided as follows (judgment): A

(a) the petitioner's suit was allowed wherein the respondent was ordered to pay RM15,039,459 (judgment sum) with interest at the rate of 5% per annum from the date of judgment until full settlement of the judgment sum; B

(b) the respondent's counterclaim was dismissed; and

(c) costs of RM100,000 was awarded to the petitioner (costs).

[4] The respondent did not appeal to the Court of Appeal against the judgment. C

[5] On 6 August 2014, the petitioner's solicitors served a notice under s. 218(2)(a) of the Companies Act 1965 (CA) on the respondent (statutory notice) which demanded the respondent to pay the judgment sum and costs within 21 days from the date of service of the statutory notice (21 days period). D

[6] The respondent did not reply to the statutory notice. Nor did the respondent pay the judgment sum and costs to the petitioner after the lapse of the 21 days period on 27 August 2014.

This Winding Up Petition E

[7] In view of the respondent's failure to comply with the statutory notice, the petitioner filed a petition on 24 September 2014 to wind up the respondent (this petition).

[8] This petition was first heard on 24 November 2014 (first hearing). At the first hearing: F

(a) the respondent did not file any affidavit to oppose this petition as required by r. 30(1) of the Companies (Winding-up) Rules 1972 (WUR);

(b) at about 9am, when this petition was first called up, the respondent was not represented, either by learned counsel or by an authorised representative. The petitioner was represented by learned counsel, Mr Yarp Khai Pin (Mr Yarp); G

(c) upon Mr Yarp's application, this court: H

(i) allowed this petition by winding up the respondent; and

(ii) appointed the Official Receiver (OR) as the liquidator for the respondent (1st Winding Up Order);

(d) at about 10.30am, the respondent's authorised representative, one Encik Mohd Shahrul Efendi bin Bahar (Encik Shahrul) came to court. Encik Shahrul is the respondent's executive officer. Encik Shahrul: I

(i) did not know of the first winding up order and once Encik Shahrul was informed of the first winding up order, Encik Shahrul "requested" Mr Yarp to attend this court;

(ii) apologised for the delay in attending court for the hearing of this petition; and

(iii) applied to set aside the 1st Winding Up Order;

(e) as the first winding up order had not been perfected, this court was not *functus officio* and could revisit the first winding up order. This is clear from the following Federal Court cases:

(i) *Ling Nam Rubber Works v. Leong Bee & Co (No 2)* [1968] 1 LNS 73; [1968] 1 MLJ 265, at 266; and

(ii) *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd* [1984] 1 LNS 6; [1984] 1 MLJ 286, at 292-293.

Furthermore, the first winding up order could be set aside as the respondent had not been heard;

(f) Mr Yarp objected to Encik Shahrul's application to set aside the first winding up order. Despite Mr Yarp's objection, I set aside the first winding up order because:

(i) the respondent has been deprived of its right to be heard in This Petition. In *Re Jagvinder Singh Maghar Singh; Ex p Mohd Radzi Ismail & Ors* [2014] 1 LNS 858; [2014] 5 AMR 139, at 148-150, I have decided that a right to be heard is a constitutional right enshrined in arts. 5(1) and 8(1) of our Federal Constitution;

(ii) 24 November 2014 was only the first hearing; and

(iii) the first winding up order was made because Encik Shahrul was late in coming to this court for only about 1½ hours;

(g) after the first winding up order was set aside, Encik Shahrul applied to adjourn this petition for two months on the ground that the respondent was trying to "settle" this petition. It should be noted that Encik Shahrul did not inform this court that the respondent intended to lodge a police report to allege that the petitioner had committed an offence in respect of the petitioner's suit; and

(h) I allowed Encik Shahrul's application to adjourn the hearing of this petition but only up to the next hearing date of this petition, namely 17 December 2014 (second hearing). I expressly informed all parties that there would be no further postponement of this petition on the second hearing. This court also dispensed with the need to advertise this petition for a second time in the Malaysian Government's *Gazette* and two local newspapers.

[9] At the second hearing:

(a) the respondent still did not file any affidavit to oppose this petition;

(b) besides Encik Shahrul, the respondent was also represented by:

(i) Cik Nor Aini bt Arbi (Cik Nor), the respondent's executive director; and

(ii) Encik Nor Rashid bin Ismail (Encik Rashid), a qualified accountant who is now the respondent's financial consultant;

(c) Cik Nor informed this court that on 1 December 2014 the respondent had lodged a police report, Sentul Police Station report no. 20205/14, against the petitioner (respondent's police report). The respondent's police report alleged, among others, that the petitioner had filed and used a false affidavit in the petitioner's suit (alleged false affidavit) which constituted an offence under s. 193 of the Penal Code (PC);

(d) based on the respondent's Police Report, Cik Nor applied to stay the hearing of This Petition until the completion of police investigation into the respondent's Police Report (stay application). Cik Nor also gave reasons regarding the respondent's financial difficulties as well as her own personal financial problems;

(e) Encik Rashid went further and stated that the judgment was erroneously given based on the alleged false affidavit!;

(f) Mr Yarp objected to the stay application and applied for an order in terms of this petition; and

(g) after hearing Cik Nor, Encik Rashid and Mr Yarp, I allowed this petition. The respondent has now appealed to the Court of Appeal against this decision.

Issues

[10] The following questions arise in this petition:

(a) whether the court should stay the hearing of this petition until the completion of police investigation into the respondent's police report;

(b) whether the respondent can oppose this petition by relying on the respondent's Police Report without filing any affidavit; and

(c) whether this court should wind up the respondent based on the judgment when the respondent's police report has been lodged.

A **This Petition Cannot Be Stayed Pending Completion Of Police Investigation**

[11] Section 221(1) CA reads as follows:

> (1) **On hearing a winding up petition the Court may** dismiss it with or without costs or **adjourn the hearing conditionally or unconditionally** or make any interim or other order that it thinks fit, but the Court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories. (emphasis added).

[12] Section 221(1) CA confers power on the winding up court to adjourn a winding up petition "conditionally or unconditionally" - please see the Court of Appeal's judgment in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485; [1997] 2 MLJ 756, at 761. Having said that, as a matter of *stare decisis*, I am bound by Abdul Hamid Mohamad JCA's (as His Lordship then was) judgment in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, at 266-269, as follows:

> I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA. I agree entirely with his views. However, I only wish to add a few words to further emphasise my unhappiness (and his too) about the way winding-up petitions are often conducted. Indeed what I am saying here is no more than what I have earlier said on at least four occasions when I was sitting in the High Court. Reference can be made to *Buildcon-Cimaco Concrete Sdn. Bhd. v. Filotek Trading Sdn. Bhd.* [1999] 4 CLJ 135, *Antara Elektrik Sdn. Bhd. v. Bell & Order Berhad* [2000] 6 MLJ 385, *Sun Microsystems Malaysia Sdn. Bhd. v. K.S. Eminent Systems Sdn. Berhad* [2000] 4 CLJ 72 and recently *SP Setia Berhad v. Gasing Heights Sdn. Bhd.* [2001] 6 CLJ 55.
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> As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications. That would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r. 32 of the Companies (Winding-up) Rules 1972 was appealed against and when the appeal was dismissed, the respondent further appealed to the Supreme Court - see *Asia Commercial Finance (M)*

Berhad v. Lum Choon Realty Sdn Bhd (Penang High Court Companies Winding-up No: 28-60-92). Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

One of the most abused procedures adopted in winding up proceedings is the application to strike out the petition under O. 18 r. 19 of the RHC 1980 and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn Berhad* [1999] 4 CLJ 135 I pointed out the undesirability of applying such procedure to a winding up petition:

> Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s. 218 winding-up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.
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> The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.
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> Furthermore, more often than not, resort to O. 18 r. 19 of RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.

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> In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

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These views were reiterated in *Antara Elektrik Sdn. Bhd v. Bell & Order Bhd* [2000] 6 MLJ 385 this time in Malay.

In *Sun Microsystems Malaysia Sdn. Bhd* [2000] 4 CLJ 72, I stressed the difference between the procedure in respect of a writ action under the RHC 1980 and a winding-up petition under the Companies (Winding-up) Rules 1972:

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> *It is important to note that the procedure in a winding-up proceeding as provided by the Companies (Winding-up) Rules 1972 is different from the procedure in a writ action as provided by the Rules of a High Court 1980 (RHC 1980). In a winding up proceeding, the procedure is simple and brief. That is what it is meant to be. When a petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.*

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On the other hand, in a writ action upon filing no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:

> We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you at the suit of ... And take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution. (emphasis added.)

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The trial date is a long way off. Indeed, there may not be none at all. It is important that the procedure applicable in a writ action should not be incorporated into a winding-up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding-up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc. in a winding up proceeding.

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> Finally, the same view was reiterated in SP Setia Berhad (Kuala Lumpur High Court Winding-up Petition No: D8-28-173-2000).
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> *Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practice, which, at the very least is delaying the hearing and disposal of winding-up petitions, which is unfair to the petitioners and clogging the court docket.* (emphasis added).

It is clear from the above judgment that the hearing of a winding up petition should not be stayed or adjourned but should instead be heard expeditiously under WUR. On this ground alone, the stay application should be dismissed.

[13] The respondent did not appeal to the Court of Appeal against the judgment. Accordingly, based on the cause of action estoppel doctrine as well as the issue estoppel doctrine (both these doctrines form the *res judicata* concept), the judgment is final as against both the petitioner and respondent. For the application of the *res judicata* concept, suffices for me to rely on Peh Swee Chin FCJ's judgment in the Supreme Court case of *Asia Commercial Finance (M) Bhd lwn. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, at 197-198, 198-199 and 199-200.

[14] The finality and binding effect of the judgment on the petitioner and respondent, is not affected in any manner by the respondent's police report. In the words of Abdul Malik Ishak JCA in delivering the Court of Appeal's judgment in *Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd* [2010] 8 CLJ 775; [2010] 5 MLJ 34, at p. 785 (CLJ); p. 43 (MLJ):

> It is legally impossible for the respondent to challenge the validity of the court order dated 3 June 2005 in the winding up proceedings. (emphasis added)

The finality of the judgment is my second reason for not acceding to the stay application (second reason).

[15] The following considerations support the second reason:

(a) even if the respondent files a fresh action to set aside the judgment, such a suit cannot set aside the judgement without proof beyond all reasonable doubt that the petitioner has obtained the judgment by fraud within the meaning of s. 44 of the Evidence Act 1950 (EA). The following cases explain the application of s. 44 EA in setting aside earlier final judgments:

   (i) the Court of Appeal's judgment given by Gopal Sri Ram JCA (as His Lordship then was) in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321, at 334-336; and

(ii) *KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases* [2014] AMEJ 1458; [2014] 1 LNS 427, at paras. 144, 146 and 147.

In this case, the respondent has not even filed a fresh suit to set aside the judgment;

(b) the validity of the judgment is fortified by s. 114(e) EA which presumes that the judicial acts of the High Court in:

(i) trying the petitioner's suit and the respondent's counterclaim; and

(ii) deciding the petitioner's suit and the respondent's counterclaim which culminated in the pronouncement of the judgment – are presumed to be regularly performed; and

(c) any prosecution for giving false evidence under s. 193 PC is generally tried in the Sessions Court according to s. 63 of the Subordinate Courts Act 1948. The issues, factual and legal, which concern a prosecution under s. 193 PC, are clearly different from the questions which arise in the petitioner's suit. I am unable to see how any decision or judgment of the Sessions Court in deciding a charge for affirming a false affidavit under s. 193 PC, can be used by the respondent to set aside the judgment pronounced in the High Court after a trial in a civil matter. The purpose and effect of police investigation and prosecution are different from the consequences of a civil judgment.

[16] The petitioner's affidavit can only be affirmed in the petitioner's suit by an individual person on behalf of the petitioner (petitioner's deponent). This is understandable as the petitioner is a non-human entity recognised by law. If the Public Prosecutor (PP) decides to institute prosecution under s. 193 PC as a result of the police investigation into the respondent's police report, only the petitioner's deponent and not the petitioner itself, can be charged under s. 193 PC. In other words, any prosecution pursuant to the respondent's police report, can only be commenced against the petitioner's deponent. Such a prosecution does not necessarily affect in any adverse manner the petitioner because it is trite law that under s. 16(5) CA, the petitioner is a legal entity which is separate from its directors, shareholders, employees and agents. Furthermore, the respondent has not filed any affidavit in this petition to justify the piercing of the petitioner's corporate veil so as to attribute any liability on the part of the petitioner's deponent to the petitioner. In other words, the police investigation into the respondent's police report and any possible prosecution of the petitioner's deponent, do not directly involve the petitioner and this petition. This constitutes the third reason why the stay application should not be allowed.

[17] There is a fourth reason to decline the stay application. Certain applications to the winding up court have to be made in open court according to r. 5(1)(a) to (g) WUR. The stay application does not fall under

r. 5(1)(a) to (g) WUR. As such, the stay application falls within r. 5(2) WUR and may be heard in chambers of the winding up court. Rule 7(2) WUR provides as follows for applications in chambers:

> *7(2) Every application in Chambers shall be made by summons in Form 1, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require that person or persons to whom the summons is addressed to attend at the time and place named in the summons; and the summons shall be served not less than two days before the day named in the summons, unless in any case it shall be otherwise ordered.* (emphasis added).

Rule 7(2) WUR is a mandatory provision as can be seen from the use of the imperative term "shall". In *Public Prosecutor v. Yap Min Woie* [1995] 4 CLJ 692; [1996] 1 MLJ 169, at 172-173, the Federal Court gave effect to the mandatory term "shall" in ss. 12(1) and 28 of the then Juvenile Courts Act 1947. It is clear that under r. 7(2) WUR, the respondent has to file a summons in chambers to apply for a stay of this petition pending completion of police investigation into the respondent's police report. An oral stay application made by the respondent's authorised representative, does not fulfil the mandatory r. 7(2) WUR.

Respondent Did Not File Any Affidavit To Oppose This Petition

[18] Rule 30(1) WUR states as follows:

> 30 Affidavits opposing the petition and affidavits in reply
>
> (1) *Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.* (emphasis added)

[19] Rule 30(1) WUR employs the mandatory term "shall" and requires the respondent to:

(a) file in the winding up court; and

(b) serve on the petitioner

- an affidavit to oppose this petition at least seven days before the hearing of this petition.

[20] The following trilogy of Court of Appeal's judgments (three Court of Appeal judgments) have held that r. 30(1) WUR is mandatory:

(a) *Crocuses & Daffodils (M) Sdn Bhd*, at pp. 761-762;

(b) *Gulf Business Construction (M) Sdn Bhd*, at p. 42; and

(c) *Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping* [2011] 1 LNS 1952; [2012] 1 MLJ 50, at 54.

[21] From the view point of the doctrine of *stare decisis*, the three Court of Appeal judgments are clearly binding on me.

[22] Despite this court's adjournment of the first hearing, the respondent has not filed any affidavit to oppose this petition. The respondent has also been expressly informed by the court at the first hearing that there would be no further postponement of this petition at the second hearing. If I consider the respondent's police report in deciding this petition, I will be allowing the respondent to circumvent the mandatory requirement of r. 30(1) WUR as authoritatively interpreted by the three Court of Appeal judgments. Furthermore, the respondent's police report has not been exhibited in any affidavit which complies with r. 30(1) WUR. In the circumstances, I am constrained to decide that the respondent cannot oppose this petition by relying on the respondent's police report without filing any affidavit as required by r. 30(1) WUR.

[23] There is another reason for the respondent to file an affidavit in this petition. The petitioner has served the statutory notice on the respondent and upon the respondent's failure to pay the judgment sum within 21 days from the date of service of the statutory notice, the petitioner may rely on a rebuttable presumption of the respondent's insolvency under s. 218(2)(a) CA. I will discuss later in this judgment regarding the application of the rebuttable presumption of the respondent's insolvency under s. 218(2)(a) CA.

Police Investigation Does Not Support Respondent's Commercial Solvency

[24] Malaysian case law has held that to decide whether a respondent company is able to pay its debts under s. 218(1)(e) CA depends on the "commercial solvency" test or "cash flow solvency" test, namely whether the respondent company is able to pay its debts when such debts are due and payable. Section 218(1)(e) CA does not depend on the "balance sheet solvency" test, namely whether the respondent company's total assets (including non-liquid assets) exceeds its total liabilities. I refer to the following appellate decisions of our courts which bind me:

(a) the Supreme Court's judgment in *Sri Hartamas DVPT Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303, at 307 and 308; and

(b) the Court of Appeal cases of:

(i) *Gulf Business Construction (M) Sdn Bhd*, at p. 40;

(ii) *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, at 961-962; and

(iii) *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817, at 827-829.

[25] It is clear from the above cases that the respondent's police report cannot show the respondent's commercial solvency or cash flow solvency so as to resist successfully this petition.

[26] I find that the respondent is commercially insolvent and does not satisfy the "cash flow solvency" test. This decision is premised on the following reasons:

(a) the judgment sum of RM15,039,459 is huge;

(b) This petition has exhibited a copy of the company search of the respondent (company search) from the records of the Companies Commission of Malaysia. The company search reveals that:

(i) the respondent has unsatisfied charges registered over the respondent's assets in favour of the following banks-

(1) OCBC Bank Malaysia Bhd.;

(2) Bumiputera Commerce Bank Bhd. (now CIMB Bank Bhd.); and

(3) RHB Bank Bhd.;

(ii) the respondent has "current liabilities" of RM839,738; and

(iii) for the financial year ending on 31 December 2012, the respondent has suffered a loss of RM228,192; and

(c) the respondent has failed to adduce any affidavit evidence to rebut the presumption of insolvency under s. 218(2)(a) CA (which will be discussed below).

Respondent's Failure To Rebut Presumption Of Insolvency Under s. 218(2)(a) CA

[27] As stated above, upon the respondent's failure to pay the judgment sum on 27 August 2014 (after the lapse of 21 days period), a rebuttable presumption of the respondent's insolvency arises under s. 218(2)(a) CA whereby the respondent has the legal burden to rebut such a presumption on a balance of probabilities. This is clear from the following appellate cases:

(a) the Supreme Court's judgment in *Sri Hartamas Development Sdn Bhd*, at p. 308; and

(b) the Court of Appeal case of *Pacific & Orient Insurance Co Bhd*, at p. 961-962.

[28] In this case, the respondent has not discharged its legal burden to rebut the insolvency presumption under s. 218(2)(a) CA for the simple reason that the respondent has not filed any affidavit in this petition. Furthermore, as explained above, the respondent's police report cannot show that the respondent has fulfilled the "commercial solvency" test or "cash flow solvency" test.

A **Court's Decision**

[29] In view of the above reasons, I allow this petition with costs and order as follows:

(a) the respondent to be wound up; and

B (b) the OR to be appointed as the respondent's liquidator.

Or To Follow Up With Respondent's Police Report

[30] To make it clear that this court does not condone the affirmation of any false affidavit, the OR as the respondent's liquidator shall follow up
C and assist fully in:

(a) the police investigation in respect of the respondent's police report; and

(b) any prosecution which may be commenced by the PP pursuant to the respondent's police report.

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